

SUPREME COURT OF ARKANSAS

No. CR05-494

ALBERT LEVON BURTON,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,

Opinion Delivered September 21, 2006

PRO SE PETITION FOR REHEARING
FROM THE ARKANSAS COUNTY
CIRCUIT COURT,
NO. CR05-494,
HON. DAVID G. HENRY, JUDGE.

DISSENT.

JIM GUNTER, Associate Justice

Jim Gunter, Justice, dissenting. I would grant the petition for rehearing. By the June 29, 2006, opinion of this court, we have overlooked our own precedent.

We have held an attorney's conduct is presumed to be within a wide range of reasonable professional conduct. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995). Further, we have held that the Rule 37 petitioner has the burden to overcome the presumption of the attorney's competency. *Seek. v. State*, 330 Ark. 833, 836, 957 S.W.2d 709, 711 (1997). To overcome this presumption, the Rule 37 petitioner must prove both deficient performance and prejudice resulting from the deficient performance. *See State v. Daniel*, 338 Ark. 571, 575, 998 S.W.2d 750, 753 (1999). By presuming deficiency instead of competence, our June 26, 2006, opinion contradicts this settled law.

We should grant rehearing to consider aligning our decision with our own precedent.

DICKEY, J., joins this opinion.